No. 71-177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

CLARE DODGE CHILDERS, ET AL, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES

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As anticipated* (P. 26), either inadvertently or by design, the Solicitor General seeks to capitalize on the Court's heavy burdens and outspoken reluctance to con-

* In the course of this brief response Petitioners' application will be referred to as "P"; their appendices as "PA", or "PB", as the case may be, and to Respondent's Memorandum for the United States in Opposition as "M".

sider disputes alleged to involve no more than private and economic rights when there is "no conflict among the circuits." (M. 2) The concise and pithy effort is misleading and wide of the mark in at least the following respects:

1) "No conflict among the Circuits"

We agree with the Solicitor General—there is "no conflict among the circuits". There couldn't be—there is no prior decision in point. *Claremont Aircraft, Inc. v. United States,* 420 F.2d 896 (9 Cir. 1970), did not involve the effect or interaction of the regulation (28 C.F.R. Part 14.9(a)), said by the Fifth Circuit to be the cement of its decision (P.B. 5), nor was the controlling statute (28 U.S.C.A. §2675(a)) urged or discussed in *Claremont,* nor was notice to deceased counsel an issue in that controversy. In fact, in *Claremont* receipt was acknowledged and no contention was made respecting the *imputation of notice* question, same being the sole question in this cause.

2) That notice to deceased counsel or a dissolved firm (by death) is notice to the "claimant" under 28 U.S.C.A. 2401(b)

§2401(b) does not even purport to deal with the "notice" question; rather "notice" is controlled by 28 U.S.C.A. §2675(a), which admittedly requires *notice to the claimant* of final denial (P. 4).

3) Failure to discuss the applicable regulations

As noted the Court of Appeals bottomed its holding on 28 C.F.R. Part 14.9(a) providing for the mailing of

notice to "the claimant, his attorney *or* legal representative." (P.B. 5, P. 3). This regulation does not authorize or sanction mailing to the attorney alone as a basis for imputing notice to the "claimant".

4) Failure to discuss the authority for the regulation

In amending the Federal Tort Claims provisions in 1966 to require primary administrative consideration of all tort claims, the Congress specifically required that notice of final denial be mailed to the "claimant". 28 U.S.C.A. §2675(a) (P. 4). Thus, if notice to "claimants" counsel is enough, and imputes notice to the unknowing claimant for *jurisdictional purposes,* that authority must be found in a *valid* regulation. To be *valid* it must be promulgated pursuant to an express or implied delegation of Congressional authority, and must not be inconsistent or in conflict with an express legislative mandate to the contrary. If the subject regulation means what the Fifth Circuit blandly says it means, it fails on both grounds. The sole grant of power claimed by the Department of Justice for the regulation is 28 U.S.C.A. §2672 (P. 4-5), and that statute may be searched in vain for such drastic alterations in the legislative scheme. And, even if the power may be implied, or is an inherent administrative power, it cannot stand alongside §2675(a) expressly requiring notice to the claimant. *Miller v. U. S.*, 294 U.S. 435, 55 S.Ct. 440, 442 (1935); *Campbell v. W. H. Long & Co.*, 281 U.S. 599, 50 S.Ct. 412, 415 (1930); *International Ry. Co. v. Davidson,* 257 U.S. 506, 42 S.Ct. 179, 182 (1922); *U. S. v. Two Hundred Barrels of Whiskey,* 95 U.S. 571, 576, 24 L.Ed. 491 (1877).

5) Failure to discuss the effect of the death of counsel

Under federal and state law the death of counsel destroys the imputative effect of notice to the decedent, *or to his dissolved firm*. The statutory power to wind up the affairs of a dissolved partnership has nothing to do with the truism that death terminates the relationship insofar as it permits the imputation of notice to the client.

6) The failure to mention the knowledge of the agency of the death of the attorney

Not only was the subject agency (FAA), and the Federal Bureau of Investigation investigating the crash resulting in counsel's death, but it has been concluded (as it must have) by other counsel for Respondent, that the Regional Counsel for the Agency knew of the death when the denial letter was mailed.

SUMMATION

It would be a legal tragedy to deny access to the courts to an unknowing claimant whose deceased counsel had been mailed a stereotyped notice letter out of Washington in care of his dissolved firm. The power to substitute notice of important rights to a representative must depend on the continuation of that representation, and, more significantly, the jurisdiction of the federal courts should not turn on the slender reed of imputed notice to an unsuspecting claimant.

The reach of this case is not limited to the Childers family; it has precedential value of significant proportions and will be a trap for the unwary and unsuspecting if permitted to stand.

Petitioners pray that this cause not be swallowed in the plethora of work that confronts the Court.

Respectfully submitted,

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CERTIFICATE

Three (3) copies have been mailed to the Solicitor General, the Attorney General of the United States, and the United States Attorney for the Southern District of Texas.